Supreme Court, U.S.
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(3) 95-1969

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ARTHUR TATE, JR., WARDEN,
Petitioner,

v.

JOHN GLENN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Petition for Writ of Certiorari establishes 1) that the recent Antiterrorism and Effective Death Penalty Act is applicable to this pending case; 2) that the Act requires federal courts to apply a more deferential standard of review in habeas cases in reviewing mixed questions of law and fact decided by state courts; 3) that at a minimum the new standards require a remand (if not an outright reversal) of the lower court's decision, vacating a death penalty sentence imposed for the killing of a police officer; and 4) that these issues collectively warrant prompt review by the Court. Respondent offers several arguments in response, all unpersuasive.

A. The Amendments To 28 U.S.C. §2254 Apply To This Case.

Respondent first argues that the Amendments cannot apply to his case because the Sixth Circuit had issued its decision before the effective date of the Act. This is simply mistaken. Glenn's case was still pending when the Act became effective because certiorari was available to the State. Besides the Court's decision in *Felker v. Turpin*, ___ U.S. ___, 1996 U.S. LEXIS 4264 (June 28, 1996), which applied the new Amendments to a pending case, Respondent overlooks several other sources of authority indicating that a change in law applies to pending cases.

First, under 28 U.S.C. 1254,

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
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> > 1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,

> before or after rendition of judgment or decree; . . .

While review by appeal is obligatory, whereas review by certiorari is discretionary, the original understanding was that certiorari, if granted, conferred "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Act of March 3, 1891, 26 Stat 826, 828, C. 517, §6.[1] Thus, "[i]f a federal question is involved, the process of direct review 'includes the right to petition this Court for a writ of certiorari.'" *Williams v. Missouri*, 463 U.S. 1301 (1983)(quotation omitted). And in the context of applying rules of retroactivity in criminal cases, the Court has stated that direct appeal ends "when . . . the time for filing a petition for certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 953 (1994) (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)).

Second, Glenn's argument goes too far. It would foreclose review based on the new Amendments no matter how clearly Congress expressed its intent to apply new legislation retroactively. A petition for rehearing in this instance would be foreclosed, since one application had already been denied and a new application would be untimely. If review on certiorari were also foreclosed, the intent of Congress to apply the Amendments to pending cases would be foreclosed as well. In Justice Steven's words: "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens J., dissenting). Of course, in this instance, more

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[1] Subsequent amendments deleted such language as surplusage.

than mere error correction is at issue. The applicability of the new Act to pending cases is a substantial federal question.

B. Congress Intended to Apply the Amendments to Pending Cases.

Glenn next argues that the simultaneous provision by Congress of a specific retroactivity clause for death penalty procedures (Title I, §107 of the Act, now codified as 28 U.S.C. §§2261-2266) and the absence of a specific retroactivity clause for the non-death penalty Amendments (Title I, §101-106, as applicable here, 28 U.S. 2254) evidences congressional intent that the new deferential review standard is not applicable here. But *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994) is to the contrary. *Landgraf* establishes a rule of construction that procedural, as opposed to substantive, amendments to existing statutes are applicable to pending cases. Since 28 U.S.C. §§2261-2266 did not previously exist, Congress gave specific direction on retroactivity since the normal *Landgraf* rule would not be applicable. However, since 28 U.S.C. §2254 already existed, the *Landgraf* rule of retroactive application to procedural issues precluded the need for a specific reference to retroactivity.

C. The Amendments Do Not Impose "New Legal Consequences" To Events Completed Before Their Enactment.

Glenn then argues that *Landgraf* precludes retroactive application of the Amendments since the new law would attach new legal consequences to events completed before its

enactment. New 28 U.S.C. § 2254, however, is entirely procedural, merely providing the mechanism by which presumptively final state court judgments of conviction and sentences shall be reviewed by a federal court. In *Felker*, the Court noted, "our authority to grant habeas relief to state prisoners is limited to §2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State Court.'" ___ U.S. ___, 1996 U.S. LEXIS 4264 *19 (1996). There could be no legitimate expectation by Glenn at the time he committed the crime that he was entitled to de novo, rather than deferential, review. Again, *Felker* reaffirmed that the Court has continually "recognized that judgments about the proper scope of the writ are normally for Congress to make." ___ U.S. ___, 1996 U.S. LEXIS 4264 *23. That the Amendment significantly alters the existing standard of review, moreover, does not change the character of the Amendment from procedural to substantive. *Dobbert v. Florida*, 432 U.S. 289, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.").

Finally, Glenn's reliance on district court decisions that rendered contrary rulings on this question merely confirms the need for prompt review. While the cases cited by Glenn hold that the recent Amendments are not applicable to pending cases, other decisions are to the contrary. *See Mullins v. Saunders* No. 96-0016-R, (D. Va., W. D., June 14, 1996); *Burton v. Russell*, No. C-1-96-28, (D. Ohio, S. D., June 26, 1996), (copies lodged with clerk). In addition, and because of the growing split of authority on this question, lower courts appear to be rendering alternative holdings on the issue, thus "assuming, without deciding, that these provisions apply retroactively to cases pending when the law was passed. . . " . *Ayala v. Speckard*, No. 95-2463, 1996 U.S. App. LEXIS 17302 (2nd Cir., July 15, 1996). In

short, a ruling from this Court will settle the issue once and for all.

CONCLUSION

For the foregoing reasons, and those expressed in the Petition, the Court should grant certiorari, or in the alternative grant certiorari and remand the case for reconsideration in light of the recent amendments to 28 U.S.C. §2254.

Respectfully submitted,

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